Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07439/2019
HU/07445/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 December 2019	**On 7 January 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between
(1) S K
(2) A K
[Anonymity direction made]

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Solomon, Counsel instructed by A & P Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. I continue the anonymity direction because the Appellants are minor children. Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellant and to the Respondent.

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against a decision of First-Tier Tribunal Judge Obhi promulgated on 30 July 2019 ("the Decision") dismissing the Appellants' appeals against the Secretary of State's decision dated 4 April 2019 refusing their human rights claims. The Appellants are nationals of Ghana currently aged five and four years respectively. Their mother, [VA], also a Ghanaian national has no right to remain in the UK. Her appeal against refusal of a human rights claim (based in large part on the position of the current Appellants) has been dismissed. The children's father, [SOK], who is also a Ghanaian national has limited leave to remain based on his relationship as the father of two daughters from another relationship. Those children are British citizens. He does not live with any of the children. He has however retained contact with his British citizen children and restored contact with the Appellants in 2018, having separated from their mother in 2015.

2. The Judge found that the children's best interests were served by remaining with [VA] given their young age. Neither of the children are "qualifying children" for the purposes of paragraph 276ADE of the Immigration Rules ("the Rules") or Section 117B (6) Nationality, Immigration and Asylum Act 2002 ("Section 117B"). The Judge found that [SOK] could go to Ghana to live or to visit the children. They could maintain contact otherwise via other forms of communication. The First Appellant has sickle cell disease, but it was found in [VA]'s previous appeal that treatment exists for that condition in Ghana. The impact of removal did not meet the threshold of Article 3 ECHR. Article 8 was not to be seen as a way of avoiding that high threshold in medical cases. Balanced against the public interest, the Judge concluded that the Respondent's decision did not breach the Appellants' human rights.

3. The Appellants challenge the Decision on a number of grounds. First, they assert that the Judge has wrongly applied the "Devaseelan" guidelines and failed to recognise that there is good reason to depart from the findings in the previous appeal as [SOK] has re-established contact with them. Second, it is asserted that the Judge has failed to consider the Appellants' case that they are able to meet paragraph R-LTRC.1.1(d) of Appendix FM to the Rules and paragraph 305 of the Rules as the children of a parent with limited leave to remain in the UK. Third, the Appellants submit that the Judge has conflated best interests with reasonableness of return, has failed to consider whether the children's best interests are to remain in the UK or return to Ghana, wrongly takes into account the parents' immigration history and wrongly applies paragraph 276ADE of the Rules and Section 117B (6) to the best interests assessment when those are irrelevant to that consideration. Fourth, it is said that if paragraph 276ADE and Section 117B (6) are relevant, then the Judge has failed to consider whether there are very powerful reasons to require the children to leave the UK. Fifth, the Appellants say that the Judge has wrongly approached the evidence about the

First Appellant's medical condition when applying the law and having failed to consider certain of the evidence. Sixth, it is said that the finding that the Appellants can maintain contact with their father and half-siblings through media communication is contrary to case-law. Seventh, it is said that the finding that [SOK] can relocate to Ghana is inconsistent with the Judge's acceptance that he retains contact with his British citizen daughters, and they cannot be expected to leave the UK. Eighth, it is said that the Judge has failed to consider the best interests of those half-siblings when considering removal of the Appellants. Finally, it is said that the Appellants' private lives should be accorded more than little weight applying Section 117B because they are children.

4. Permission to appeal was refused by First-tier Tribunal Judge Saffer on 4 October 2019 as follows:

> "The grounds have no merit at all. They amount to nothing more than a disagreement with the findings the Judge was entitled to make on the various issues in the case, and a disagreement with the decision."

5. The Appellants renewed their application to the Upper Tribunal. Permission to appeal was granted by Upper Tribunal Judge Blundell on 7 November 2019 in the following terms:

> "Amongst other things, it was clearly submitted to Judge Obhi that paragraph 305 of the Immigration Rules applied to these minor appellants. That submission is recorded at [18] of the judge's decision and appears in writing at [8] of the skeleton argument which was before the judge. It was found by the judge that the appellants enjoy a family life (albeit overstated) with their father. They are both under 18. They were born in the United Kingdom. It has not been suggested, as I understand it, that they have formed an independent family unit. And they have not been away from the United Kingdom for more than two years since birth.
> In these circumstances, there was an arguable case that paragraph 305 of the Rules did indeed apply (although it might be argued by the respondent that the appellants do not seek to 'join or remain with' their father given the absence of current or intended cohabitation). It was arguably an error of law for Judge Obhi not to consider the application of the paragraph and any such error was arguably material, given that satisfaction of the Rules would have been positively determinative of the appeal on Article 8 ECHR grounds.
> I give permission to argue each of the points in the grounds, although the issue I have identified above is potentially the most significant."

6. The matter comes before me to decide whether the Decision does contain any error of law and, if I so conclude, either to re-make the decision or remit the appeal to the First-tier Tribunal for re-making.

DISCUSSION AND CONCLUSION

7. I begin with ground two which found favour with Judge Blundell when granting permission. In order to consider this ground, it is necessary to set out the relevant

parts of the Rules which are as follows. The emphasis applied to the relevant sections of the Rules is mine.

Part 8 of the Rules: Paragraphs 304-309

Children born in the United Kingdom who are not British citizens

304. This paragraph and **paragraphs 305-309 apply only to dependent children** under 18 years of age who are unmarried and are not civil partners and who were born in the United Kingdom on or after 1 January 1983 (when the British Nationality Act 1981 came into force) but who, because neither of their parents was a British Citizen or settled in the United Kingdom at the time of their birth, are not British Citizens and are therefore subject to immigration control. **Such a child requires leave to enter where admission to the United Kingdom is sought, and leave to remain where permission is sought for the child to be allowed to stay in the United Kingdom.** ..

Requirements for leave to enter or remain in the United Kingdom as the child of a parent or parents given leave to remain in the United Kingdom

305. The **requirements to be met by a child born in the United Kingdom who is not a British Citizen who seeks leave to enter or remain in the United Kingdom as the child of a parent or parents given leave to enter or remain in the United Kingdom are that he:**

(i) (a) is accompanying or seeking to join or remain with a parent or parents who have, or are given, leave to enter or remain in the United Kingdom; or

(b) is accompanying or seeking to join or remain with a parent or parents one of whom is a British Citizen or has the right of abode in the United Kingdom; or

(c) is a child in respect of whom the parental rights and duties are vested solely in a local authority; and

(ii) is under the age of 18; and

(iii) was born in the United Kingdom; and

(iv) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

…

Leave to enter or remain in the United Kingdom

306. A child born in the United Kingdom who is not a British Citizen and who requires leave to enter or remain in the circumstances set out in paragraph 304 may be given leave to enter for the same period as his parent or parents where paragraph 305(i)(a) applies, provided the Immigration Officer is satisfied that each of the requirements of paragraph 305(ii) – (v) is met. **Where leave to remain is sought, the child may be granted leave to remain for the same period as his parent or parents where paragraph 305(i)(a) applies, provided the Secretary of State is satisfied that each of the requirements of paragraph 305(ii) - (iv) is met. Where the parent or parents have or are given periods of leave of different duration, the child may be given leave to whichever period is longer except that if the parents are living apart the child should be given leave for the same period as the parent who has day to day responsibility for him.**

307. If a child does not qualify for leave to enter or remain because neither of his parents has a current leave, (and neither of them is a British Citizen or has the right of abode), he will normally be refused leave to enter or remain, even if each of the

requirements of paragraph 305(ii) – (v) has been satisfied. However, **he may be granted leave to enter or remain for a period not exceeding 3 months if both of his parents are in the United Kingdom and it appears unlikely that they will be removed in the immediate future, and there is no other person outside the United Kingdom who could reasonably be expected to care for him.**

…

Refusal of leave to enter or remain in the United Kingdom

309. **Leave to enter the United Kingdom where the circumstances set out in paragraph 304 apply is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 305 is met.** Leave to remain for such a child is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 305 (i) – (iv) is met.

Appendix FM to the Rules

Family life as a child of a person with limited leave as a partner or parent

This route is for a child whose parent is applying under this Appendix for entry clearance or leave, or who has limited leave, as a partner or parent. For further provision on a child seeking to enter or remain in the UK for the purpose of their family life see Part 8 of these Rules.

…

Section R-LTRC: Requirements for leave to remain as a child

R-LTRC.1.1. The requirements to be met for leave to remain as a child are that –

(a) The applicant must be in the UK;

(b) The applicant must have made a valid application for leave to remain as a child; and either

(c) (i) the applicant must not fall for refusal under any of the grounds in Section S-LTR: Suitability – leave to remain; and

(ii) the applicant meets all of the requirements of Section E-LTRC: Eligibility for leave to remain as a child; and

(iii) a parent of the applicant has been or is at the same time being granted leave to remain under paragraph D-LTRP.1.1. or D-LTRPT.1.1. or indefinite leave to remain under this Appendix (except as an adult dependent relative); or

(d) (i) the applicant must not fall for refusal under any of the grounds in Section S-LTR: Suitability – leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRC.1.2.-1.6.; and

(iii) a parent of the applicant has been or is at the same time being granted leave to remain under paragraph D-LTRP.1.2., D-ILRP.1.2., D-LTRPT.1.2. or D-ILRPT.1.2. or indefinite leave to remain under this Appendix (except as an adult dependent relative).

Section E-LTRC: Eligibility for leave to remain as a child

E-LTRC.1.1. **To qualify for limited leave to remain as a child all of the requirements of paragraphs E-LTRC.1.2. to 2.4. must be met (except where paragraph R-LTRC.1.1.(d)(ii) applies).**

Relationship requirements

E-LTRC.1.2. The applicant must be under the age of 18 at the date of application or when first granted leave as a child under this route.

E-LTRC.1.3. The applicant must not be married or in a civil partnership.

E-LTRC.1.4. The applicant must not have formed an independent family unit.
E-LTRC.1.5. The applicant must not be leading an independent life.
E-LTRC.1.6. **One of the applicant's parents (referred to in this section as the "applicant's parent") must be in the UK and have leave to enter or remain or indefinite leave to remain, or is at the same time being granted leave to remain or indefinite leave to remain, under this Appendix (except as an adult dependent relative), and**

(a) The applicant's parent's partner under Appendix FM is also a parent of the applicant; or

(b) The applicant's parent has had and continues to have sole responsibility for the child's upbringing or the applicant normally lives with this parent and not their other parent; or

(c) There are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.

8. I am of course currently dealing with the issue whether there is an error of law in the Decision. I can deal very shortly with the Judge's treatment of the submissions made based on paragraphs 304 to 307 of the Rules and Appendix FM to the Rules. Although the Judge refers to being invited to "consider Immigration Rule 305", she does not thereafter consider it or the alternative submission which I am told was made in relation to the Appendix FM provisions. The issue for me therefore is whether the error is a material one. It can only be material if the outcome would be or is likely to be different if these provisions had been considered.

9. Before I turn to consider the proper interpretation of these parts of the Rules, it is necessary to say a little more about the facts of the Appellants' cases. I noted at [1] above that [VA] with whom the Appellants live had previously made a human rights claim which was refused and her appeal dismissed. The decision on that occasion was that of First-tier Tribunal Judge Broe promulgated on 2 August 2017 ("the 2017 Decision"). I will need to say a bit more about the 2017 Decision later but for now I simply note that the Appellants' mother made an application for leave to remain based on domestic violence asserted against the children's father in September 2015 which application was refused on 22 December 2015. She then applied for leave to remain based on her family and private life which generated the decision under appeal at that time.

10. The facts as found in the 2017 Decision include that [VA] was subjected to domestic violence from [SOK] following the birth of the First Appellant in September 2014, that she left the matrimonial home and was placed by Social Services in bed and breakfast accommodation until she could return to the matrimonial home and she had not seen the children's father since. The Second Appellant was born in September 2015 and there had been no contact from then until the date of the hearing in July 2017. The evidence before Judge Obhi was that [SOK] resumed contact with the Appellants in July 2018, therefore about a year prior to the hearing before Judge Obhi.

11. As I remarked in the course of the hearing, if the Appellants' submission regarding these provisions of the Rules is correct, the effect would be to give the Appellants leave to remain where their mother (with whom they live day-to-day) has no leave. Their mother would then be able to apply for leave to remain based on the Appellants' leave. That is something of an absurd consequence, but I accept that, if the Appellants are right about the construction of the relevant Rules any such absurdity would have to be ignored and they would be entitled to leave to remain if they are able to meet those Rules. That would then be relevant to the balance to be struck under Article 8 ECHR.

12. As it is, I have concluded that the Appellants' interpretation of the relevant Rules is incorrect for the following reasons.

13. Dealing first with paragraph 305, there was brief discussion at the hearing whether those provisions could apply at all following the introduction of Appendix FM. I accept Mr Solomon's assertion that, by reason of paragraph A280(b), paragraph 305 continues to apply.

14. However, as Mr Solomon also accepted, paragraph 305 has to be read in the context of the section read as a whole.

15. As Judge Blundell noted when granting permission some importance attaches to the words "join or remain with". Mr Solomon said that according to the natural meaning of those words, there was no requirement that the Appellants be living with their father. If that were the requirement, then the words "reside with" would be used. I can accept that the children do not have to be living with a parent in order to qualify. So much is evident from the final sentence of paragraph 306 (although as I will come to, that does not assist the Appellants here). However, paragraph 305 also has to be read in the context of paragraph 304 which is concerned with a child seeking entry clearance, leave to enter or leave to remain. It is for that reason that paragraph 305 uses the words "join or remain with".

16. The first point to make about the paragraphs read together is that there is a requirement for "dependency" inherent in the scheme as a whole, as appears at paragraph 304. That sets the context. Moreover, looking at the three subsections of paragraph 305 (i), it is also evident that the scheme envisages an ongoing parental relationship between child and parent. Looking at the scheme as a whole, its purpose appears to be to promote the formation of family unity or continuation of such family unity between a child and its parent(s).

17. Looking first at whether those requirements are met in this case, Mr Solomon said that the requisite dependency was established on the evidence and that [SOK] has a parental relationship based on contact. I cannot however accept that submission, particularly as regards dependency. Mr Solomon directed my

attention to one payment of £280 to the children's mother in May 2019 ([AB/62]). There is no evidence that I can see about the reason for that payment or even that it was intended to provide any support to the Appellants. As Judge Obhi noted at [10] of the Decision, the Appellants' mother is supported financially by the local authority. Mr Solomon also drew attention to the Appellants' father attending medical appointments with their mother on two occasions in October 2018 and April 2019. Such contact as is disclosed by the evidence is however very limited.

18. It is also necessary to look at Judge Obhi's findings about [SOK]'s relationship with the Appellants. At [19] of the Decision, she refers to the Appellants' situation "as they are dependent on their primary caregiver". Having noted the history of domestic violence and [SOK]'s lack of contact with the Appellants until recently, Judge Obhi says the following about the father/children relationship:

> "20. …[VA's] evidence to the previous Tribunal is that the children's father, [SOK] was an unsupportive partner, subjecting her to violence and abandoning her to care for the children, resulting in the children having to rely on protection from the local authority, and funding from the local authority to meet their basic needs. I am now told that he is a devoted father who is involved in taking the children to school on two or three days a week and that he has contact with them at weekends and that the children see the children from his relationship.
> 21. In light of the different account given to the previous Tribunal, I have to be cautious in accepting what I am not told. I accept that [SOK] does have contact with the children at the present time. This is an Article 8 claim and I am satisfied that there is a family life between the mother and the appellants and between [SOK] and the appellants. I find however that this has been overstated for the purposes of this appeal. He may well be attending their schools two or three times a week, and having weekend contact, but the history of his relationship with the children and their mother is poor, to the extent that the local authority was having to financially support the children as [SOK] was not exercising his responsibility over them. It is significant that the mother described herself in the role of a parent with sole responsibility."

19. Whilst I appreciate that those findings are not made in the context of considering dependency or parental relationship, they are fatal on any view to the establishment of dependency by the Appellants on [SOK]. The findings made, in essence, are that [VA] and the Appellants are financially dependent for support on the local authority and that the Appellants are dependent on [VA] for their care (as to which see also [29] of the Decision). Whilst the Judge accepted that [SOK] has some contact, albeit "overstated", that is confined to taking and picking up from school and some weekend and holiday contact. [SOK]'s statement says that the Appellants "shared their emotional feelings" and it appears from what is there said would like their parents to reconcile, there is no evidence that this has occurred or is even intended. There is no evidence of any emotional dependency particularly in circumstances where, for the majority of their young lives, the Appellants have had no contact with their father at all.

20. For completeness, as I have already noted, paragraph 306 envisages the possibility that the child seeking leave may not be living with both parents but provides that if the parents are living apart the child should be given leave in line with the parent who has "day to day responsibility". In this case that is the Appellants' mother and she has no leave.

21. Coming back to the words "join or remain with" in paragraph 305 those must be considered in the context of the totality of paragraphs 304 to 309. When that is done it is evident that what those words are intended to convey is the proposed or continued union of a child with the parent or parents on whom he/she is dependent where that parent has the right to be in the UK and in circumstances where therefore the child cannot be expected to leave (see in particular paragraph 307).

22. On the facts of this case, the evidence before Judge Obhi and her findings, those provisions cannot avail the Appellants. The First Appellant had no contact with his father from the age of about six months until just before his fourth birthday. The Second Appellant had no contact at all with her father from birth until just before her third birthday. Both children have only had resumed contact with [SOK] for about a year as at the date of the First-tier Tribunal hearing and eighteen months as of now.

23. Turning then to the provisions of Appendix FM, the Appellants' case is even weaker. As Mr Solomon accepted, the Appellants can only succeed based on paragraph R-LTRC.1.1.(d) of Appendix FM because they cannot meet all of the eligibility requirements. He was also constrained to accept that in relation to the reduced eligibility requirements which apply in relation to paragraph R-LTRC.1.1(d), the Appellants cannot meet E-LTRC.1.6.(a) or (b). That is because [VA] is not also the partner of [SOK] (for the purposes of (a)) and the parent with leave (ie [SOK]) does not have sole responsibility for the children and they do not live with him (which would be required by (b)).

24. Accordingly, Mr Solomon was forced to argue that there were "serious and compelling family or other considerations which make exclusion of the child undesirable". I was not taken to any authority in relation to the meaning of those words. As discussed during the hearing, the wording is the same as that of paragraph 297(i)(f) of the Rules. Mr Solomon was able to tell me that the relevant case in that context was that of Mundeba (s.55 and para 297 (i)(f))) [2013] UKUT 88 (IAC) where the following guidance was given in relation to the relevant sub-section of paragraph 297:

> "iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-

> a there is evidence of neglect or abuse;
> b. there are unmet needs that should be catered for;
> c. there are stable arrangements for the child's physical care;
> The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission."

Those factors have no bearing on the circumstances in this case. If anything, the factors would suggest that the children's welfare would be adversely affected by remaining with [SOK] due to the history of domestic violence. The children have been living since birth with [VA], are supported in the UK by Social Services due to [SOK]'s abdication of responsibility and there is no evidence of "unmet needs" in relation to the children. As Judge Obhi put it at [21] of the Decision, "the history of [SOK's] relationship with the children and the mother is poor".

25. For those reasons, I conclude that the provisions of the Rules on which the Appellants rely do not avail them. Accordingly, I conclude that the error made by Judge Obhi in failing expressly to consider these provisions is not material. On her findings, those provisions of the Rules could not possibly be met.

26. I turn then to the other grounds which Judge Blundell considered to be weaker. As a preface to those other grounds, I observe that the Appellants accept that the Devaseelan guidance is of application in this case but, they say, the Judge failed to recognise that the findings made in the 2017 Decision were only a starting point and that there was "very good reason to depart from the finding in the previous determination because the appellants were previously not a party to the proceedings, their father is now back in their lives, he was granted leave under the 10-year parent route in August 2018 and following the FtT hearing, and the arguments are not the same and significantly different" ([2] of the grounds).

27. I do not accept that the fact that the Appellants were not party to the 2017 proceedings makes any difference and certainly no significant difference. The focus of [VA]'s appeal was the position of the children who were at that time and remain her dependents. As such, if she were to be removed, the children would also have to leave the UK. It is for that reason appropriate to begin with the findings made about the Appellants in the 2017 Decision.

28. I begin with the First Appellant's medical condition. He suffers from sickle cell anaemia. The evidence given by [VA] at that time was that "[h]er son requires full time care and was in hospital in June of this year. She said that the Ghanaian hospital offering treatment is seven hours from her 'family home'. She would find it 'very unreasonable' to use public transport for seven hours" ([13]). [VA] also gave evidence that, although she has family in Ghana, she was estranged from them due to her relationship with [SOK]. [VA] also gave evidence that she has another son in Ghana who was born following a rape. The Respondent in that appeal relied on evidence that sickle cell anaemia "was relatively prevalent in Ghana where 2% of babies were born with the condition. There as a 95% survival rate. There were 107 registered schemes providing basic health care" ([17]). In

response, [VA]'s representative asserted that the only hospital which could provide treatment was in Accra which made it impossible for the First Appellant to be treated there due to distance.

29. The Judge made the following findings based on the evidence at that time:

> "21. The Appellant has two children both born in this country. It is accepted that they are not British citizens. She has provided medical evidence of her son's condition and I accept that he suffers from sickle cell anaemia for which he had the benefit of NHS treatment. The Appellant says that one of the reasons she wants to stay in this country is so that she can earn money to pay what she owes for the treatment. I therefore assume that there is an outstanding bill for that treatment. The Appellant accepts that treatment is available in Ghana although she says that it would be 'very unreasonable' to expect her to travel a long distance to gain access to it. She says that she could not relocate to Accra because she has no family there although that is also the position in which she finds herself in this country."

30. Subsequently the Judge considered the health condition in the context of Article 8 and said this:

> "29. I have considered whether Article 8 might be engaged because of any effect on the health of the Appellant's son. The Appellant provided his medical records which show that he has received treatment in this country. It has not been suggested that his health is such that the threshold in N v SSHD (2003] EWCA Civ 1396 is met so as to engage Article 3."

The Judge then self-directed himself in accordance with GS and EO (Article 3 – health cases) India [2012] UKUT 397 (IAC) – "GS (India)"- as well as Akhalu (Health claim: ECHR Article 8) Nigeria [2013] UKUT 00400 (IAC). Relying in particular on what was said in the latter case, the Judge concluded at [31] of the 2017 Decision that Article 8 was not engaged by the First Appellant's health condition.

31. Judge Obhi had regard to those findings at [19] of the Decision. In terms of further evidence, [VA] stated that the First Appellant has medical appointments every six months, and that he was to have an operation, but it had not gone ahead ([15]). [SOK] said that the medical condition was more common in Africa ([14]). There is a letter dated 13 June 2019 from Northampton General Hospital at [AB/24-25]. That reads as follows so far as relevant to the issues here:

> "Prognosis however is very poor in underdeveloped countries particularly in Africa. In Africa there are several problems namely the risk of infection and lack of safe blood products. Hence for this reason most children die in the early years of life. [SK] is at a great risk if he does not get the appropriate treatment on time.
> …
> With appropriate medical interventions and frequent follow up [SK[is leading a near-normal life here in the UK. For the same reason this family will greatly benefit from staying in the country…"

The Consultant Paediatrician who wrote this letter says nothing about his knowledge or experience of treatment available in Ghana. More importantly, he does not say that treatment is not available there or say anything which adds to or counters the evidence available to the Judge when reaching the 2017 Decision.

32. I accept that Judge Obhi does not expressly refer to this letter when reaching her findings at [23] of the Decision (although she does refer to a letter from another Consultant Paediatrician dated 10 October 2018). However, the June 2019 letter does not undermine the Judge's finding at [23] of the Decision that "[t]reatment for Sickle Cell Disease is available in Ghana and although the appellant's parents may have to pay for treatment, it is available". That conclusion is not challenged by the Appellants and nor is there any challenge made to the Judge's finding that the First Appellant's medical condition does not reach the Article 3 threshold. Their point is rather that, even though it does not reach that threshold, the health condition may still engage Article 8 ECHR.

33. The Appellants rely in their grounds on this point to GS (India) in the Tribunal. As Mr Lindsay pointed out however the Tribunal's decision has since been considered by the Court of Appeal and it is therefore more appropriate to consider what that Court had to say about Article 8 in health cases. This appears at [86] of the judgment as follows:

> "If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [2012] EWCA Civ 279 at paragraph 23:
>
> > 'The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported.'"

34. As the Judge rightly observed at [23] of the Decision, therefore, "[t]he first appellant is nowhere near the threshold under Article 3, and as PF reminds us that the threshold is not lower under Article 8". Put another way, an Article 8 claim based on a health condition is not simply an Article 3 claim applying a different threshold. An applicant must show some other element relevant to the engagement of Article 8 which affects his private and family life. Here, there was

no evidence save that considered separately under the headings of best interests and reasonableness of return. There is therefore no error in the Judge's consideration of the First Appellant's health condition. Nor is there any error in her adoption of the findings in the 2017 Decision. She took those findings as a starting point but considered the further evidence in the context of the legal landscape which now applies and reached her own findings at [23] of the Decision.

35. I therefore turn to the Judge's analysis of the best interests of the Appellants. The Appellants complain that the Judge has muddled the concept of best interests with the issue whether it is reasonable to expect the Appellants to return to Ghana. I accept that at [24] to [28] of the Decision, when setting out the law which applies, the Judge does appear to conflate the issues to some extent. However, she does recognise the following points:

- The welfare of the children is a primary consideration ([24]);
- The best interests of the children have to be considered before deciding whether it is reasonable to expect them to leave ([26]);
- The Appellants are not "qualifying children" for the purposes of the Rules or Section 117B(6) – it is nonetheless appropriate to consider whether it is reasonable to expect them to leave ([24] and [25]);
- The guidance in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 is relevant to the consideration of best interests and those must be determined before considering proportionality of removal ([26]);
- When considering best interests, that assessment must be conducted independently of the position of the parents ([27]);
- However, in accordance with the Supreme Court's judgment in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, the assessment of the child's situation has to take account of the "real world" situation.

When those paragraphs are read together, I am satisfied that the Judge has understood the difference between the two issues. Moreover, thereafter, the Judge does deal with the two issues separately.

36. First, in relation to the Appellants' best interests, the Judge says as follows:

> "29. I make the following findings in relation to the children. They are cared for by their mother, they have never been separated from her, and if it is necessary for her to leave the UK then their best interests are served by remaining with her. Their father has permission to remain in the UK and should he seek to extend that permission, he has the option of visiting them in Ghana. He could, if he chose return to live with them in Ghana. He states that he is a self-employed person running his own company, although he has allowed the State to provide for his children in the past, he now says that he will maintain them. There is no reason why that maintenance cannot be provided to enable his children and their mother

> to return to Ghana and to reestablish themselves there. Whilst I appreciate that they have half-sisters in the UK, they also have a half-brother in Ghana, and possibly other relatives that the parents have not provided information about."

37. Although the Judge does not make an express finding whether it would be in the children's best interests to remain in the UK or return to Ghana, the Judge finds that the Appellants' best interests are strongly to remain with their mother where she is. Since, as the Judge says, [VA] has no right to remain in the UK, it is implicit in these findings that the Judge finds that the Appellants' best interests are to return to Ghana with their mother if that is where she is living.

38. The Judge considers the recently renewed contact with their father. There is nothing in the Appellants' objection to the reference to [SOK] returning to live in Ghana. The evidential position is that he has limited leave to remain because of his daughters from his relationship with a different partner (which relationship no longer subsists so that he does not live with this family). It is clear from the findings that what the Judge is there considering is that [SOK] might opt not to extend his leave after December 2020 and could at that point choose to return to Ghana. It must of course be remembered that [SOK] was content to have no contact with the Appellants for a period of about three years. In any event, that finding is very much an alternative to the finding that the contact between the Appellants and their father can be maintained by visits and indirect contact. In the circumstances of this case and the limited contact between father and children, there is no error in the Judge's finding that such contact could be continued in that way.

39. The Appellants' half-siblings are considered but, as the Judge notes, the Appellants also have a half-sibling in Ghana. In any event, the evidence about contact between the Appellants and those half-siblings (also formed very recently) is that "they are happy together when I take them outside". There are a few photographs of the children together with their father. That is the extent of the evidence which does not indicate the extent if any to which the Appellants have formed a familial relationship with those half-siblings.

40. For those reasons, there is no error of law in the Judge's consideration of the Appellants' best interests.

41. Turning then to the Article 8 assessment, there is nothing to the point that the Judge ought not to have considered paragraph 276ADE of the Rules or Section 117B (6). As I have already noted, those provisions clearly do not apply. The children are not qualifying children for those purposes. Even though the Judge did not need to refer to those provisions at all, that cannot be to the detriment of the Appellants; if anything, the Judge's approach is overly generous. Since those provisions do not apply, the ground which relates to the way in which the Appellants say that they are to be applied is of no relevance. There is no error in this regard.

42. Moreover, when assessing Article 8 outside the Rules, the Judge does not apply those provisions. The Judge's assessment is contained at [30] of the Decision as follows:

> "In summary therefore applying the Razgar guidelines, I am satisfied that the appellants have a family life with their mother, their father and their half-sisters in the UK. In relation to their mother there is no interference in their family life by the decision of the respondent as they will remain together. In relation to their father and their half-sisters there is an interference by this decision, but applying the public interest factors set out in Section 117B of the Nationality Immigration and Asylum Act 2002, including the effective enforcement of a fair immigration policy and protecting the UK's economy and services, and carrying out a balancing exercise, I am satisfied that the public interest overrides any private interest of the appellants. This is because the only interference will be in the context of their relationship with their father. It is within his power to change that by either carrying out visits to them or by returning to live in Ghana. In relation to the half-sisters, these are not such important relationships that they override the appellants' relationships with their parents. These relationships can be maintained through the internet, Facebook, Skype and FaceTime, and through visits during holidays. The children will be returning to a country in which they have extended family to support them and their mother. Should [SOK] abandon his responsibility towards the children, it would be preferable for their mother to have the support of her extended family, than to be reliant on social services. For all these reasons I am satisfied that the decision of the respondent is proportionate. There are no exceptional circumstances in the case, [SK]'s SCD is not sufficient to make this case exceptional for the reasons which I have given."

43. There is nothing to the ground that the Judge has erred by giving the Appellants' private lives little weight because they are children. In the first place, that is not what the Judge does at [30]. She deals with the elements of the Appellants' private and family lives, weighs those in the balance based on the evidence and balances those factors against the public interest in Section 117B (1). There is no reference to Section 117B (5). In any event, however, the point made by the Appellants by reference to cases in 2016 and 2018 is now overtaken by the Court of Appeal's decision in SA (Afghanistan) v Secretary of State for the Home Department [2019] EWCA Civ 53 (handed down in February 2019 and to which no reference was made in the grounds pleaded in August 2019), where Lord Justice Simon said this:

> "31. It is also clear from the quotation from Lord Wilson's judgment on the second issue that there will be cases, notwithstanding the limited weight that can be attached to the private life of those whose immigration status is precarious, which have 'particularly strong features of the private life' that will outweigh 'the normative guidance' in s.117A(2)(a) and s.117B(5). It is perhaps unhelpful to talk in terms of children being 'blamed' for a developed private life in this country during formative years, while their immigration status is precarious. There is no question of 'blame'. However, once an assessment is made that article 8 is engaged, and a further assessment must be made as to whether removal will interfere with the

private life, the weight attached to the private life is to be weighed in accordance with the statutory criteria."

44. For the above reasons, I am satisfied that there is no merit to any of the Appellants' grounds. Judge Obhi was entitled to take as her starting point the 2017 Decision. She considered the evidence post-dating that decision and made findings based on that evidence. She considered the Appellants' best interests based also on the evidence which, as to contact with [SOK] and particularly with their half-siblings is extremely thin. She then conducted a balancing exercise outside the Rules to assess whether it was reasonable to expect the Appellants to leave the UK with their mother who has day-to-day care of them and notwithstanding the limited and short-standing contact with their father who is likely to remain in the UK with his other British children. For reasons which I have explained at some length, although Judge Obhi did not deal with the argument that the Appellants could succeed under the Rules based on the limited leave which their father has derived from his relationship with his other two children, that argument has no merit. Accordingly, the failure to deal with that argument is not material. In conclusion, therefore, there is no material error of law disclosed by the grounds.

CONCLUSION

45. For all the above reasons, I am satisfied that the Decision does not contain an error of law. Accordingly, I uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Obhi promulgated on 30 July 2019 with the consequence that the Appellants' appeals stand dismissed

Signed Dated: 3 January 2020

Upper Tribunal Judge Smith